No. 11842

United States Circuit Court of Appeals

for the Ninth Circuit

LOUIS RAPHAEL DE PRATU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

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Billings, Montana;

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SUMMARY OF FACTS.

Appellant's fact statement is considered inadequate, hence this summary.

In support of the three counts of the indictment it was incumbent to prove (a) that on three occasions appellant represented himself to be a citizen; (b) that on all said occasions he was an alien; and (c) that he acted knowingly and 'falsely'.

That appellant did represent himself to be a citizen does not seem to be controverted; nor that he did so knowingly. The government's case is disputed only as to its proof of the falsity of the representations.

All three claims of citizenship, which are the subject of the indictment, were made in the year 1946. At that time De Pratu was in the management and control of a saloon at Great Falls, Montana, known as the Stockman's Club. The business was incorporated and DePratu was the President and principal investor. (The corporation was a 'non-profit' concern and was said to be "indebted" to DePratu in the sum of $20,000.00. In September, 1945, "the said L. P. DePratu, thereupon offered to obtain slot machine licenses in accordance with the laws of the State of Montana and to pay for same personally, providing he would be secured at some future date for said expenditure." R. 166-167, etc.)

The corporation had not been organized a sufficient length of time to obtain a liquor license. (R. 140-145.) Accordingly, on January 15, 1946, DePratu personally applied for a Montana retail liquor license and obtained such license. (R. 77.)

Again on June 27, 1946, he similarly, and personally, applied for and was granted a Montana retail liquor license. The forms which he signed contained full instructions, including a dotted line bearing the designation

("Full names of all applicants for this license. Please print or type.")

In each of said applications appears:

"Are you a citizen of the United States? Yes."

Each application was sworn to before a Notary Public. Each was filed with the Montana Liquor Control Board, and both contain endorsements showing that appellant obtained the license applied for. (R. 75-78.)

In further prosecution of the business in question appellant in September, 1946, was interested in importing a musician named Gonzy to appear at the Stockman's Club in Great Falls. (R. 130.)

On September 11, 1946, in Sweet Grass, Montana, a port of entry to the United States, three immigration inspectors, including the witness, Arthur Matson, had certain proceedings with reference to the eligibility of Gonzy to be admitted into the United States. Appellant appeared before the Board and testified among other things that he was himself a citizen of the United States. (R. 125-126-129.) He also at this time made the claim that "they told me I was under age and that I was a citizen", apparently referring to his early years. Appellant in the year 1946 was the age of sixty-eight years. He had spent the last fifty years of that time in the United States. (R. 97.) He was and had been in business at Great Falls, Montana, and a resident in that city for twenty years prior to the time of trial. (R. 160-161.)

Exhibit No. 6 is a duly authenticated certificate, the body of which reads as follows:

"April 10, 1947.

CERTIFICATE OF NON-EXISTENCE OF NATURALIZATION RECORD

I, Henry Colarelli, hereby certify to the fol-

lowing:

1. That I am Chief of the Information, Mail and Files Section, Office of Administrative Services, of the Central Office, Immigration and Naturalization Service, United States Department of Justice, and by virtue of such position and the authority thereof, that I am custodian of all records of the Central Office of the United States Immigration and Naturalization Service, including any and all naturalization records required to be filed with the Commissioner of Immigration and Naturalization pursuant to Section 337, Nationality Act of 1940 (8 U.S.C. 737) and pursuant to the similar requirements of the Act of September 27, 1906 (43 Stat. 596) in effect prior thereto.

2. That I have caused diligent examination and search to be made of said records, and that there does not appear therein any record filed pursuant to the foregoing statutes nor any record whatsoever evidencing the naturalization of one Louis Raphael DePratu or Louis Patrick DePratu.

(Seal) /s/ HENRY COLARELLI,
Chief, Information, Mail
and Files Section."

(R. 99-100.)

Witness Frank S. Nooney was a federal official, to-wit: Assistant to the Operations Officer in the Spokane Office of the Immigration and Naturalization Service. That office has the official records for the States of Montana and Idaho, that part of Washington east of the Cascade Mountains, and the five Northeast counties of Oregon. This was a territory, of course, within which appellant had lived for some twenty years. Witness Nooney testified (R. 104-105)

that he had made a search to determine whether the appellant was ever naturalized as a citizen of the United States and that he had found no record of such naturalization. Witness stated, however, that he did have a record of the non-naturalized aliens residing within the territory mentioned and that Louis Raphael DePratu or Louis Patrick DePratu was recorded as an alien.

On February 8, 1936, the appellant applied for registration as an alien in the following words:

> "I Louis Raphael DePratu, Gillman, Montana, **an alien,** believing that there is no record showing that I am now a lawful permanent resident of the United States, hereby request that under the provisions of the Act of Congress approved March 2, 1929, a record of registry of my arrival in the United States be made." (R. 102.)

On November 16, 1940, appellant executed and caused to be filed an instrument of registration. Exhibit 5. (R. 96-98.) This was entitled in the United States Department of Justice, Immigration and Naturalization Service, as "ALIEN REGISTRATION FORM" and contains the statement that he is a citizen or subject of

"Uncertain, but last of Canada."

It also states that he was born in Alexandera, Ontario, Canada. The instrument is sworn to before a Registering Official.

No evidence whatever was offered on the issue of citizenship in behalf of defendant. Defendant did not

take the stand. The only testimony offered was concerned with the operation of the Stockman's Club in a seeming attempt to prove that appellant was not applying for a liquor license for himself on the two occasions in question, but for the corporation. Many portions of the corporation minutes were offered and some of them admitted by the court, which had no tendency to show anything except that the liquor licenses were desired for the business of the corporation. Nothing in these minutes had any tendancy to show that DePratu did not knowingly and intentionally sign the applications which are in evidence. They were apparently offered in support of a defense theory that DePratu would not be guilty of the crime charged if he intended to obtain the liquor licenses by a subterfuge instead of by an outright application by the ineligible corporation itself. The trial court repeatedly called attention to the weakness of this theory.

No evidence was introduced in any wise seeking to supplement, correct or impeach the certificate of non-existence of naturalization record. (Exhibit 6.) No evidence rebutting or touching the testimony of witness Nooney and his records at Spokane, Washington, was offered. No evidence was introduced impeaching or tending to impeach the integrity of the instruments in which DePratu alleged himself to be a citizen. No evidence whatever was offered on the transaction before the Immigration Officials at Sweet Grass, Montana, in September, 1946. Accordingly

the government's evidence went to the jury entirely unchallenged in all respects and as to every material issue.

SUFFICIENCY OF INDICTMENT.

All three counts of indictment are questioned by appellant on the ground that the same do not sufficiently allege a fraudulent scheme or plan on the part of the accused.

In approaching the question the court will not fail to observe that the old statute now repealed, 18 U.S.C. 141, contained as one of the elements of the corpus delicti the phrase,

"for any fraudulent purpose whatever".

Whereas the present section of the Nationality Code under which this indictment was drawn omits such phrase. The difference between the two statutes is noted and discussed in United States v. Achtner, 144 F. (2d) 49. This is conceded by appellant's counsel on pages 13 and 14 of his brief.

Whatever may have been the requirements in the matter of pleading a specific fraudulent purpose under 18 U.S.C. 141, we are quite content with the interpretation in United States v. Achtner. The only requirement, as we understand it, is that the indictment disclose and the proof establish that the false claim of citizenship was not made in jest or in empty boasting, but was made seriously to a person having a right to inquire. The three counts of this indict-

ment all comply with that rule.

Count 1 and Count 2, identical except for the date, allege that the claim of citizenship was made

> "in an application for a retail liquor license under the laws of the State of Montana, filed by him with the Montana Liquor Control Board."

This is certainly a compliance with the rule that the statement was deliberately and seriously made in answer to a question propounded by one who had a right to ask it. The Montana Liquor Control Board and the laws of Montana under which it operates and under which it issues liquor licenses are all matters of judicial cognizance by the Courts of the United States and do not, of course, require to be pleaded in an indictment. Chapter 84, Ll. Montana 1937, Sec. 3, Sec. 5 and Sec. 10. See appendix.

The indictment states the facts from which the inference of fraud arises; viz., that DePratu sought to obtain a liquor license by making a false statement that he was a citizen. **The laws of Montana require that licensees be citizens of the United States.** It is submitted that if the indictment had set forth verbatim a copy of the written application for liquor licenses, not only would the indictment be no better, but would offend against the provisions of Rule 7 (c) of the Rules of Criminal Procedure by making it prolix and full of surplusage.

Count 3 complies with the rule. It alleges that the

false claim of citizenship made at Sweet Grass, Montana, on September 11, 1946, was made.

> "before a board of special inquiry of the Immigration and Naturalization Service of the United States, having been first duly sworn as a witness,"

and further states that the defendant

> "did wilfully and knowingly **testify** in part as follows:",

following with the alleged false statement charged in Count 3.

Here again we have the allegation of facts, which disclose that the claim of citizenship was made not in jest or in idle boast, but made deliberately and seriously in answer to a question propounded by a person who had a right to ask. It does not seem to the writer that the court needs a blue print of the plan of this count of the indictment to show its sufficiency in respect of the attack made by appellant. It may be emphasized, however, that one who is sworn, and who testifies, and who does so before officers of the United States, is not engaged in jest or in boasting, and there is no room for construction of Count Three to that effect. There is certainly the plain intendment by the language used that the officers of the Immigration Service were engaged in official business, and that they had the right to ask the question which the appellant falsely answered.

The case of United States v. Weber, 71 F. Supp. 88 (Dist. Ct. N. D. Ill.) is cited with the claim that it sup-

ports the appellant's contention. There are several answers which may be made.

It is not difficult to distinguish the Weber case on the facts. The indictment held to be insufficent merely stated that the representation was made to the "Andrew Company of Chicago and to its officers," without disclosing any facts as to the purpose of asking the question or making the representation. In other words, the specific averments of fact, for lack of which the Chicago court held the indictment bad, are fully contained in the present indictment.

District Judge Sullivan in his opinion cites and purports to follow United States v. Achtner, 144 F. (2d) 49, and so, in our judgment, if his actual decision may be considered as going beyond the rule declared in the Achtner case, it must be deemed in conflict with it. That it does go beyond the Achtner case, at least in its dicta as to the true ruling of pleading, we think quite obvious. District Judge Sullivan quotes with approval some ancient decisions from the state jurisdiction of Illinois in support of his ruling of which two examples can be given here:

People v. Hobbs, 352 Ill. 224, 185 N.E. 610:

The indictment was held bad because in charging embezzlement against the Treasurer of "Johnson City Relief Association, a voluntary association of individuals", the indictment did not state the names of all the individuals composing the association (!)

Wallace v. People, 63 Ill. 451:

Indictment charging larceny of property of "American Merchants Union Express Company", failed to state that the company was a corporation.

However meritorious may have been the logic and however salutary may have been the practice in the day when that kind of decision was current in the courts, it is manifest that the Rules of Criminal Procedure, particularly Rule 7 (c), were intended once and for all to abolish the fiction that a defendant's rights are prejudiced by such alleged defects. (Rule 7 (c) is in appendix).

In the last section of District Judge Sullivan's opinion, page 91, he sets forth that the defendant would be prejudiced by the failure of the indictment to state whether "the Andrew Company is a partnership or a corporation". He goes on to say that it should be stated in the indictment who the members of the partnership were, if it was a partnership, and who the officials of the company were, if it was a corporation. Giving the utmost consideration to this line of reasoning, we submit that it is completely answered by the provisions of Rule 7 (f) of the Rules of Procedure, providing for bills of particulars. (See Appendix).

In final comment upon the Weber case it is certainly proper to observe that the authority of District Judge Sullivan does not transcend the authority of

Judge Brown. Judge Brown's comments on this indictment are more consonant with the Rules of Criminal Procedure than those of Judge Sullivan:

> "It seems to me that under the authority of the Circuit Court of Appeals of this Circuit, and under the statute, all that is necessary to charge the offense in the indictment is contained in the first seven lines of the indictment, and that all after that, to me, is surplusage in the indictment, not necessary to the charging of the offense at all." (R. 111.)

(The court referred to the first seven lines of **Count three,** which in the original document end with the words "and without otherwise being a citizen of the United States.")

It will thus be seen that the trial judge regarded the latter portion of Count three as consisting merely of evidentiary allegations, and it may be that this court will agree with him. Regardless of that fact, however, and whether the latter allegations are surplusage or not, they do make specific and exact the charge against the defendant so that he could not be subject to double jeopardy by reason of indefiniteness in the charge.

This court has twice recently had occasion to announce the rule as to the sufficiency of an indictment.

> United States v. Bickford, 168 F. (2d) 26.
> McCoy v. United States, decision August 24, 1948, not yet reported).

In the first of these decisions this court laid down the following rule,

> "It is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."

Citing in support of such rule:

> Hagner v. United States, 285 U.S. 427
> Berger v. United States, 295 U.S. 78
> Hopper v. United States, 9 Cir., 142 F. (2d) 181.

In the McCoy case, decided by the entire bench of the Ninth Circuit, the court said:

> "the claim that the indictment is fatally defective rests upon a strained technical analysis of the drafter's rhetoric to the effect that a mere possible meaning of the language used could be," etc.

> "The indictment must be considered as a whole, and the violated statute is cited in it and plainly informs the accused of the law allegedly violated."

All three counts of the indictment here conform to those decisions.

CONTENTION THAT COUNT THREE CHARGES PERJURY

Pages 47-48 of appellant's brief make the claim that the trial court should have applied the rules as to proof of perjury in dealing with the evidence of the government in support of Count Three. We have already set forth and discussed the contents of Count Three, but it may be briefly further referred to. As directed by Rule 7 of the Rules of Criminal

Procedure, it is entitled with the citation of the law charged to have been violated, and reads:

"(Falsely Claiming U. S. Citizenship.)
(8 USCA 746(a) 18)"

So the defendant was fully informed of that.

Now, after alleging what the false representation was, and the time and place, it goes on to say that the appellant was under oath and that he testified. The counsel seized upon these circumstances to base a contention that the government was trying unsuccessfully to plead a count for perjury—in other words to construct a straw man. What the trial court thought of the effort we produce from the transcript:

> "The Court: Whether the Board had authority to administer oaths, or not, is, in my opinion, something that is immaterial, because the statute doesn't require that a representation of citizenship be made under oath before it is unlawful. A representation not made under oath, if untrue, would be as unlawful as one made under oath."
>
> ---
>
> "The third count, in my opinion, isn't legally sufficient to charge perjury. If the man was being prosecuted on a charge of perjury, I would have sustained the motion to dismiss on the third count, because in my opinion, the count isn't legally sufficient to charge perjury at all. There may be sufficient in the count, if the statements made under oath by the defendant there before this Board were untrue, were false, it may be that he might be guilty of perjury, but he is not being prosecuted for perjury at all in this case on this indictment.

> It seems to me that under the authority of the Circuit Court of Appeals of this Circuit, and under the statute, all that is necessary to charge the offense in the indictment is contained in the first seven lines of the indictment, and that all after that, to me, is surplusage in the indictment, not necessary to the charging of the offense at all." (R. 110-111.)

Carrying out further the concocting of a straw man, appellant cites

Fotie v. United States, 137 F. (2d) 831, and states (R. 47):

" . . the court **concluded** that perjury was charged" etc. (My italics.) The word "concluded" amounts to a statement that the appellate court in the Fotie case had before it a contention or dispute as to whether the indictment charged perjury or charged something else. No such condition existed. A short quotation will suffice:

> "Two indictments were returned against the appellant in the district court, the first, No. 15,228, charging him with violation of sec. 79 of the Criminal Code, 18 U.S.C.A. sec. 141, and the second, No. 15,239, in three counts **charging him with the crime of perjury under sec. 125 of the Criminal Code, 18 U.S.C.A. 231 . . . .**
>
> By stipulation the cases were consolidated for trial before the court without a jury." (Italics supplied.)

The appellate court was not required to decide, and did not decide, any question as to either indictment involving a doubt or dispute as to what crime was char-

ged. It did not hold either indictment insufficient. It treated both indictments as sufficient. It proceeded to discuss in two separate sections of the opinion "The First Indictment" and "The Second Indictment" and its decision deals entirely with the legal sufficiency of the **evidence** (a) to sustain the conviction on the first indictment and (b) to sustain the second. Both bodies of proof were held insufficient.

For the reasons stated all that the Fotie case decided was that in a prosecution for perjury "period" the proof of the crime must consist of either two witnesses or one witness and corroborating circumstances - - - which rule we would have had to comply with if we had charged perjury. Since the only case cited wholly fails to support this contention of appellant, no further discussion seems required.

APPELLANT'S CONTENTIONS INVOLVING SUFFICIENCY OF EVIDENCE, PRESUMPTION OF INNOCENCE, DERIVATIVE CITIZENSHIP, ETC.

The various sections of appellant's brief dealing with the subjects mentioned in the above title really amount to a single contention, which is to the effect that the government did not make a case to go to the jury because of what it did not prove. The problem was succinctly stated by the trial court (R. 139):

"The question is how far is the government

> required to go in its proof to exclude all hypotheses and all conjectures, no matter how extreme they may be."

The government's proof of alienage, as already summarized in the first portion of this brief, showed that appellant in 1936, after a long residence in the United States, petitioned the Immigraton Service to take notice of the fact that he was an alien and to render his American residence lawful (i. e., not subject to deportation, we suppose, since no other reason appears) by making an administrative finding and determination. (R. 102.) It further showed that he again, in 1940, made a declaration, with all the required solemnity prescribed by statute, that he was an alien, and invoked the administrative functions of the government to register him as such. (R. 96-98.) It further showed that the Chief of Information, Henry Colarelli, made search of the master files on April 10, 1947, and found that DePratu was not named in said files. It further showed that the Spokane office of the Immigration Service made search, as of the date of the trial, and that its records showed DePratu to be an unnaturalized alien. (R.103-105). It further showed that DePratu was born in Canada. (R. 97.)

The criticism made of this body of proof is that it was not a prima facie case because the government did not expressly prove that DePratu's father was not a counsular officer in Canada, and did not expressly

disprove that his father entered the country and became naturalized while appellant was under 21. Whether this was not in effect done by the government's case, by a strong inference of fact, we submit by the following analysis:

The existence of derivative citizenship is rebutted by two acts shown to have been done by appellant. (1) In 1936 he petitioned the Department to make a record of his arrival in this country, in order to establish himself as a "lawful permanent resident". (2) in 1940 he filed the Alien Registration instrument.

Both these acts were not mere admissions, they were demands or requests made by appellant that the administrative machinery of the government be put in motion, in the first instance, to have himself listed as an alien lawfully residing in this country; in the second instance, to make a record of his alienage.

IF IT WERE A FACT THAT BEFORE HE CAME OF AGE—ABOUT THE YEAR 1882—HIS FATHER HAD BECOME NATURALIZED AND THEREBY DERIVATIVE CITIZENSHIP HAD ACCRUED TO HIMSELF, HE HAD HAD MORE THAN FIFTY YEARS TO LEARN THAT FACT. AND IF THAT HAD BEEN THE FACT, HE WOULD HAVE APPLIED FOR A CERTIFICATE OF DERIVATIVE CITIZENSHIP, NOT ASKED TO BE REGISTERED AS A NON-CITIZEN.

Thus these two acts stand unexplained—one in 1936, the other in 1940—and the inference there-

from that he had no derivative citizenship was proper for the jury to draw. The claim that the government was under the burden of going back to the preceding generation and establishing that appellant's father was an alien, etc., was dealt with by the trial court as follows:

> "The Court: Well, I can go with you on a part of your argument, Mr. Davidson, I think it is sound. I think that portion of your argument where you maintain that the burden is on the government to prove that this defendant was not a citizen of the United States when he made the representation is sound. I don't have any doubt about it. But here is the question. That is the burden that is on the government as before the jury. This question now is for me to direct a verdict of acquittal, and if there is any evidence at all in the case from which the jury could reasonably conclude that the man was not a citizen, I have no right to direct a verdict of acquittal. If the evidence is in such state that the minds of reasonable men could differ, I have no right to direct a verdict, and there is admitted in evidence this exhibit, Exhibit 5, a writing signed by the defendant in which he said he was born at or near Alexandera, Ontario, Canada. This is his statement. If the jury accepts that statement as true, that establishes his citizenship right there, and establishes that he is not a citizen of the United States. Now, there is a legal presumption that a condition once shown to exist is presumed to exist as long as things of that nature exist. So, he has established himself by his statement as a citizen of a country other than the United States. Now, there is no presumption at all that I know of that one

gains citizenship by reason of lengthy residence in the United States; no such presumption as that that I know of now exsits. In answer to the question, "I am a citizen or subject of," he said, "Uncertain, but last of Canada." So he there again says that his last citizenship status that he knew about was that of a Canadian. He does say, "Uncertain," which means little to my mind, and certainly it doesn't mean that he believes he is a citizen of the United States. He doesn't say there he believes he is a citizen of the United States, but is uncertain about it. He said he was uncertain about his citizenship, the last he knew about it was he was a Canadain. Of course, it is true, and in my opinion, you are correct in your argument that if he came to this country when he was 17 years old, and that is the evidence, and his father or mother came with him, and his father was thereafter naturalized, if he was under 21 years old at the time his father was naturalized, he became a citizen; but if, at the time of his father's naturalization, he was over 21 years of age, he would not became a citizen. But there is no presumption, that I know of that his father came here and was naturalized. There is no presumption that he was naturalized while this man was under the age of 21 years, so as to grant to defendant the benefit of derivative citizenship through the citizenship of his father. **In other words, the question is how far is the government required to go in its proof to exclude all hypotheses and all conjecture, no matter how extreme they may be.** I don't think that the government, in order to make a prima facie case, is required to go to that length, is required to go to the length of showing whether the father of this defendant himself became a

> naturalized citizen of the United States, and further to show that if the father did become naturalized, he did not become naturalized during the minority of this defendant and while this defendant was residing in the United States. To me that seems to be requiring or placing a burden of proof upon the government that the government couldn't possibly be expected to assume, and particularly in view of the testimony of the inspector here that was given and stands uncontradicted that they may or may not have a record of a minor child whose father was admitted to naturalization, depending upon the record his father furnishes at the time of his admission to citizenship." (Italics supplied.) (R. 137-140.)

The same reasoning applies with equal force to the hypothesis that appellant's parents were American citizens residing in Canada. He had had fifty years to learn that fact, if it existed, and he did not take the witness stand.

Likewise, his Canadian birth resulted, of course, in Canadian citizenship. There exists no presumption that by residence in the United States he became naturalized.

United States ex rel. Barilla v. Uhl, 27 F. Supp. 747:

> "True, the burden is upon the government of proving alienage (United States ex rel, Bilokumsky v. Tod, 263 U.S. 149, 44 S.Ct. 54, 68 L.Ed. 221), but I think the burden has been met by the government, because the relator here was born in Italy and was an alien when he entered the country and on several of his re-entries to this country he was still an alien

> and this status is presumed to have continued until the contrary is established. Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628.

At this point it is proper to juxtapose the language of the Supreme Court which pretty well settles all questions of presumptions and inferences, including particularly the extent of the presumption of innocence, which appellant invokes. Dunlop v. United States, 165 U.S. 486, 502:

> "The position of the defendant in this connection is that the presumption of the defendant's innocence in a criminal case is stronger than any presumption, except the presumption of the defendant's sanity, and the presumption of knowledge of the law, and that he was entitled to a direct charge that the presumption of the defendant's innocence was stronger than the presumption that the messengers, who deposited these papers in their proper boxes, took them from the mails. If it were broadly true that the presumption of innocence overrides every other presumption, except those of sanity and knowledge of the law, it would be impossible to convict in any case upon circumstantial evidence, since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts. Thus, if property recently stolen be found in the possession of a certain person, it may be presumed that he stole it, and such presumption is sufficient to authorize the jury to convict, notwithstanding the presumption of his innocence. So, if a person be stabbed to death, and another, who was last seen in his company, were arrested near the spot with a bloody dagger in his possession, it would raise,

in the the absence of explanatory evidence, a presumption of fact that he had killed him. So, if it were shown that the shoes of an accused person were of peculiar size or shape, and footmarks were found in the mud or snow of corresponding size or shape, it would raise a presumption, more or less strong according to the circumstances, that those marks had been made by the feet of the accused person. It is true that it is stated in some of the authorities that where there are conflicting presumptions, the presumption of innocence will prevail against the presumption of the continuance of life, the presumption of the continuance of things generally, the presumption of marriage and the presumption of chastity. But this is said with reference to a class of presumptions which prevail independently of proof to rebut the presumption of innocence, or what may be termed abstract presumptions. Thus, in prosecutions for seduction, or for enticing an unmarried female to a house of ill-fame, it is necessary to aver and prove affirmatively the chastity of the female, notwithstanding the general presumption in favor of her chastity, since this general presumption is overridden by the presumption of the innocence of the defendant. People v. Roderigas, 49 California, 9; Commonwealth v. Whittaker, 131 Mass. 224; West v. State, 1 Wisconsin, 209; Zabriskie v. State, 43 N.J. Law, 640; 1 Greenl. Ev. § 35. This rule, however, is confined to cases where proof of the facts raising the presumption has no tendency to establish the guilt of the defendant, and has no application where such proof constitutes a link in the chain of evidence against him.

In such cases as the one under consideration, it is not so much a question of com-

> parative presumptions, one against the other, as one of the weight of evidence to prove a certain fact, namely, that these papers were taken from the mails. It was a question for the jury to say whether the facts proven in this connection satisfied them beyond a reasonable doubt, and notwithstanding the presumption of innocence, that these papers were taken from the mails; and the abstract instruction requested would only have tended to confuse them, since, if literally followed, it would have compelled a verdict of acquittal."

The argument concerning derivative citizenship can very well be disposed of on the following quite reasonable basis: Derivative citizenship would have to be acquired before appellant came of age, which would be in the year 1899, since he was born in 1878. It could not happen at any later date. However, both in 1936 and 1940 he declared himself to be an alien. The jury would have the right to accept the evidence that he was an alien both in 1936 and 1940, or in either of those years. Such being the fact, derivative citizenship would be impossible because of the age factor. Concerning the alleged possibility of appellant having been the child of U. S. citizens living in Canada, the same reasoning would apply with equal or greater force.

The jury would then properly come to the point of considering whether appellant, between 1936-1940 and the year 1946, when the representations were made (January, June and September), became naturalized by the statutory procedure. They would have

to regard the uncontradicted showing made by the Colarelli certificate and the Nooney testimony, i.e., by the records of the Spokane office of the Immigration Service as well as the master records of the entire national service, that appellant was still in the year 1947 a non-naturalized resident of this country, and therefore that he could not have been a citizen at any time in the year 1946.

To ask the court to take the case from the jury in the face of such a record, as counsel did by their motion for acquittal, was merely to invite the court to ignore the facts in evidence.

NO BREACH OF THE RULE THAT ADMISSIONS REQUIRE CORROBORATION

In complaining of the rulings of the trial court appellant has failed to observe the distinction between admissions made before the time of the offense charged, on the one hand, and admissions in the nature of confessions which are made after such time. The statements of appellant which he asserts to be admissions consist of two written declarations hereinbefore discussed, viz., his petition to be 'regularized' as a resident alien and his registration as an alien before the Immigration Service. These two declarations were, as herein noted, made in 1936 and 1940 respectively—the one eight years and the other six years before the time of the crime charged. Such

declarations are not within the rule that corroboration is required.

> Warszower v. United States, 312 U.S. 342, 347
>
> "The rule requiring corroborations of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact. Cases in the circuits are cited by petitioner to the contrary. In Gulotta v. United States, the decision turned on the similarity of confessions and admissions rather than upon any differences between admissions before and after the fact. In Duncan v. United States and in Gordnier v. United States the conclusion was reached without any comment upon this difference. Our consideration of the effect of admissions prior to the crime leads us to the other conclusion.
>
> The law requires that a jury be convinced beyond a reasonable doubt of the defendant's guilt. An uncorroborated confession or evidence of perjury, given by one witness only, does not as a matter of law establish beyond a reasonable doubt the commission of a crime, but these are exceptions to the normal requirement that disputed questions of fact are to be submitted to the jury under appropriate instructions. In this case the earlier statements of birth and therefore necessarily of residence outside of the United States, if believed by the jury, prove the falsity of the statements to the contrary in the application. Where the crime

> charged is a false statement and where it finds its only proof in admissions to the contrary prior to the act set out in the indictment, it may be unlikely that a jury will conclude that the falsity of the later statement is proven beyond a reasonable doubt, but such evidence justifies submission of the question to them.
>
> In this present case there was other evidence of the falsity of the disputed statements in the application."

This court will have observed that appellant's brief relies on

Duncan v. United States, 68 F. (2d) 136, and
Gulotta v. United States, 113 F. (2d) 683,

and will now observe from the foregoing quotation that they are both specifically overruled insofar as they hold (if they do hold) that admissions prior to the time of the offense charged require corroboration.

The third and last case relied on by appellant on the point under discussion is

United States v. Isaacson, 59 F. (2d) 966,

which has to do with the corroboration required of the prosecution in a perjury case, and contains no discussion whatever of the doctrine concerning extra-judicial admissions.

Accordingly this point is unsupported by any authority whatever, and requires no further discussion **on the assumption of appellant that the declarations in question were not corroborated.**

But they were corroborated. The declaraitons proved he was an alien in 1936 and 1940. The Immigration Service records proved he was an alien in 1947 and 1948. This was all part of a continuing status over a 12-year period. So the record does not support appellant even if he had any authority for the rule asserted.

FAILURE TO CHARGE ON CIRCUMSTANTIAL EVIDENCE

In appellant's brief, pp. 41, 42, are discussed his Specifications 17, 20 and 21. As a basis for the contention under this head counsel says:

> "The evidence as to defendant's citizenship, or lack of the same, is entirely circumstantial."

What the trial court thought is shown on R. 183:

> "We have direct and positive evidence, oral and in writing, that the man said he was a citizen of the United States. We have direct and positive evidence, if believed by the jury, that the man is not a citizen of the United States. Neither one of these things have been proven by circumstantial evidence or indirect evidence."

The same counsel made the same contention which he makes here, in

> McCoy v. United States, 9th C.C.A., Aug. 24, 1948, (not yet reported).

It is believed that just about everything this court's opinion in the McCoy case contains on that subject

is pertinent, but we do not wish to quote it all. In part it must be:

> "Measured by the above rule there is evidence of both kinds in the case, each of which, in all probability, had considerable weight with the jury. However, even with the aid of such a concise statement, it is not always easy to lay one item of evidence on one side of the distinguishing line and another item on the other side of the line. Much evidence, which, with its recital, would be classed as direct evidence, upon closer observation turns out to be circumstantial in character. Events occur so often in pattern that we accept them as direct evidence of a fact proved, whereas they are only facts which habitually accompany the fact we deem proved. Any rule for the special treatment of evidence upon the basis of its character, direct or circumstantial, is bound to be difficult of correct application. And too, any instruction to a jury directing a different treatment for circumstantial evidence than is to be accorded direct evidence will, if heeded at all, tend to confusion and incite in the juror's mind the too prevalent and persistent illusion that circumstantial evidence is inferior to direct evidence. The giving of any such instruction is very apt to be regarded as in some degree judicially confirming the not uncommon belief that a conviction by the aid of circumstances is highly unreliable and unconscionable. The books are full of judicial discord through attempts to distinguish between direct and circumstantial evidence in jury instructions."

We insist that the trial court rightly stated that there was no circumstantial evidence in the case.

There could have been evidence that the defendant had voted at American elections without challenge, which would have been a circumstance consistent with citizenship. He could have testified that he had had a homestead patent issued to him by the United States Land Office, which would have been consistent with citizenship. He could have testified that he had served in the armed services of the United States, which would have been consistent with citizenship. These would have been circumstantial. However, no such evidence was offered, either by defendant himself as a witness, or therwise. On the other hand the government did not offer any such circumstances as a part if its case. It did not offer proof that defendant had attempted to vote in Montana elections and been successfully challenged. It did not offer proof that he had voted in a Canadian election, or exercised some other right consistent with Canadian citizenship. These are illustrative instances of the kind of evidence that might properly be called circumstantial in this kind of a case. There was none of that kind. For that reason alone the court was justified in declining to run the risk of confusing and misleading the jury by charging them on how to deal with a kind of evidence that did not exist in the case at all.

In the McCoy opinion this court further noted that the trial court fully protected the defendant in the charge which it did give:

> "When the charge to the jury is read as an integrated whole, as all instructions should be read, it is seen that the court in simple, understandable language defined the essential rights of both government and accused. It understood and realized that the duty of the jury was to listen to everything the court permitted to be presented to it and under certain fundamental rules to apply it to the issue of guilt or innocence. Together with defining the fundamental rules for the consideration of the evidence, the court told the jury: 'When two conclusions may be reasonably drawn from the evidence, the one of guilt and the other of innocence, the jury should reject the one of guilt and accept the one of innocence, and in that event should find the defendant not guilty. That is where two conclusions can be drawn as reasonably one way as the other, one pointing to the guilt and one to the innocence, you, of course, must indulge the presumption of innocence and draw the conclusion of innocence.' "

In its charge in the instant case the trial court charged (R. 219):

> "The guilt of an accused is not to be inferred because the facts proved are consistent with his guilt, but on the contrary before there can be a verdict of guilty, you must believe beyond a reasonable doubt that the facts proved are inconsistent with his innocence, and if two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the former."

And he also charged with respect to intent (R. 224):

> " * * * both of these elements, namely, act and intent, must not only exist, but must

be proven in this case to the satisfaction of your minds beyond a reasonable doubt, else you must find the defendant not guilty, and the intent with which an act is done may be inferred from the attendant circumstances, but, when the circumstances are such as to furnish the basis for an inference of some intent other than that necessary to constitute the particular crime charge, a verdict of guilty of the crime charged cannot be sustained."

Lastly, this court quoted with approval:

Gurera v. United States, 40 F. (2d) 338, and

Affronti v United States, 145 F. (2d) 3,

in their application to the record which existed in the McCoy case and which exists here, viz.,. that the government's case is "unexplained and uncontradicted."

"In Gurera v. United States, 40 Fed. 2d 338, 340 (Cir. 8), it is said: 'There are cases where such form of instruction is proper but those are cases where the essential facts are proven only by circumstantial evidence, and where such evidence, taken to be true, is as consistent with innocence as with guilt. That is not the situation here. The evidence here shows that, if the jury should believe the facts as detailed by the government, in fact, it may be said if they believe those facts which are undisputed, then there would be no room for more than one construction thereof because they are not consistent with innocence.' In Affronti v. United States ,145 Fed. 2d 3, 9 (Cir. 8), it is said:'Some of the evidence in this case was circumstantial, such as the evidence of flight. Some was direct and positive. The court might properly have told the jury that some of the evidence was circumstantial, and have includ-

> ed in its instructions the circumstantial evidence rule. Since the evidence of the government was unexplained and uncontradicted, and if believed, was inconsistent with the innocence of the defendant, we think that the failure of the court to include the circumstantial evidence rule in its instructions was not error. Gurera v. United States, 8 Cir., 40 F, 2d 338, 340; Corbett v. United States, 8 Cir., 89 F. 2d 124, 128; Stryker v. United States, 10 Cir., 95 F. 2d 601, 604.' See also Bedell v. United States, 78 Fed. 2d 358, 368 (Cir. 8)."

Not only did DePratu himself not testify, but he offered no evidence whatever except some corporate records which contradicted nothing and explained nothing, and some applications for beer licenses which contain no questions or answers concerning citizenship whatever. (R. 151-159.)

THERE WAS NO SOLE RELIANCE ON CANADIAN BIRTH TO PROVE NON-CITIZENSHIP

Because of the emphasis which the trial court placed on the Canadian birth of appellant, and the lack of any presumption that he had been naturalized, there is an effort to show that the government's case is as weak as that in

Colt v. United States, 158 F. (2d) 641,

in which the government merely proved birth in Romania and offered no evidence of non-naturalization. The distinction is easily apparent.

> "The trouble here is that there are no circumstances which fairly indicate that Colt

has never been naturalized."

"The proof does not show that in 1942 he had not become a citizen."

"Indeed the transcript shows that the district attorney stated before closing his case that he had a witness from the Bureau of Naturalization by whom he could prove that Colt had not been naturalized, but did not think it necessary to use him."

In the present case we covered that ground twice, once by the Colarelli certificate, which includes the entire United States (R. 100), and again by witness Nooney, whose records covered the State of Montana, in which DePratu had lived for many years immediately and continuously before the year 1946, (R. 103-5, also defense opening statement, R. 141). And we covered it twice more by the written declarations of DePratu in 1936 and 1940 that he was an alien.

It is contended in appellant's brief, by the quoted remarks of the trial court, that if the government had rested merely on proof of Canadian birth, there might have been a ruling by the trial court contrary to the Colt case. The emphasis which the trial court placed on the Canadian birth was occasioned—when the context of the entire colloquy between court and counsel is read—by a discussion back and forth as to what meaning should be placed on the words, "I am a subject or citizen of what country: Uncertain, but last of Canada." The charge to the jury did not rest the

issue on Canadian birth alone, but the court said: (R. 239.)

> "So, if his statement were that he was born in Canada, **and the other evidence in this case is true and believed by you,** that establishes that he is a Canadian citizen and thus an alien as far as citizenship in the United States is concerned." (Emphasis supplied.)

Immediately following the Colt case in the report is a companion case,

Campa v. United States, 158 F. (2d) 643,

in which the court (CCA 5th Circuit) said:

> "In Colt v. United States, 158 F. 2d 641, this court has had occasion to discuss fully the nature and quantum of proof required to support a conviction of the offense charged here. We reversed the judgment there for the complete absence of proof as to whether defendant had been naturalized. Here, while the proof would have been more complete if the government had followed up the declaration of intention with evidence that it had been allowed to lapse and no certificate of naturalization had ever issued to defendant, the evidence was yet ample to support the verdict that he was an alien and that he had not been naturalized."

In the present case our proof went far beyond that in the Campa case, which was held to be ample to support a verdict of guilty.

EXCLUDED EVIDENCE AND GIVEN AND REFUSED CHARGE ON "MOTIVE" AND "INTENT".

Complaint is made of the ruling of the trial court

excluding testimony by the attorney for the Montana Liquor Control Board that the application of De Pratu for a liquor license was "deemed" to be the application of his corporation, and also of the exclusion of some corporate minutes which it is claimed show that appellant was intending to apply "for the corporation and not for himself." In the same connection complaint is made of the court's refusal to give a charge on **motive** (not intent) and of the court's charge as to the knowledge which appellant had that the coproration was ineligible to acquire a liquor license. (Appellant's Brief, p. 49 et seq.)

Counsel summarizes his contention as follows:

> "The defendant suffered prejudice in that the defense that the application was **not intended to represent anything as to DePratu's citizenship** was virtually withdrawn from the jury." (Emphasis supplied. Brief p. 54.)

To begin with, the trial court did admit some of the corporate proceedings as shown in its minutes, and did admit the beer license application, upon the urging of defense counsel that these matters bore upon the issue of intent; it went further in this direction than appeared necessary. (R. 146-158, 164-168, 172-174.) The portions of corporate minutes excluded were either hearsay and self-serving, or were after the fact, or were wholly foreign to the subject, or all three.

The beer license was admitted (R. 156-158). It

states nothing as to citizenship and was viewed by the trial court as tending to prove nothing as to intent, but he let it in with the remark:

> "I think the Court should, where that question (intent) is involved, as it is here, should be somewhat liberal in permitting evidence on that question to go to the jury. After all, this is the defendant's side of the story, and while I say it may not impress me, it may impress the jury, I don't know. He should have the opportunity to tell it to them. So, the objection will be overruled and it will be admitted in evidence simply and purely as to the question of the intent of the defendant." (R. 156.)

It should further be observed that all the excluded matter on this question of "for whom were the licenses applied for?" could have established nothing more than was already undisputedly in evidence in the government's case; viz., that DePratu **could not lawfully get a license for the corporation** and therefore applied for one for himself. It would have simply proved over again that the government not merely admitted, but asserted; viz., that the reason he applied for a license personal to himself was because he could not get one for the corporation—the Liquor Board just would not issue one to the corporation,—which he well knew because his attorney had learned that and had so advised. What possible probative tendency would this have either to show an innocent intent or disprove a guilty intent, in making the false claim of citizenship? It would have been just as

false, and just as much a violation of the statute, no matter for whom the license was applied.

Before going further, it should be observed that defense counsel stated to the jury something which he never offered to prove: (R. 141.)

> "We expect to show that Mr. DePratu **did not read these printed documents,** but filed them and that he had no intention to make any false representation as to his citizenship, and that, therefore, no offense is shown under the charges in the indictment." (Emphasis supplied.)

Of course the defense never offered or tried to prove that appellant did not read the applications (which, if offered, might have been pertinent to the issue of 'knowingly' at least) and the reason doubtless is because they were determined not to put appellant on the witness stand. Whatever the reason, they stated to the court and jury that they would prove this—that DePratu never read the applications—and either did not intend to prove it at all, or changed their minds. By not offering any such evidence they left the documents speaking for themselves—signed by the appellant, and of course, **knowingly signed.**

(While we are on the subject of the defense opening statement, we ask the court to read it through (R. 140-141)—it is less than two pages—and to observe that no promise is made whatever of any defense to the **third count** involving his testimony before the Immi-

gration officers that he was a citizen of the United States; nor any assertion that he had any kind of citizenship at any time. He did undertake to make a defense to the indictment, and the only fragment of a defense which he proposed to make dealt with the existence of intent on the first two counts.)

So, taking into consideration what the defense promised to prove and did not, and what they did not even promise to prove, in what position is the appellant's complaint that the excluded evidence contained anything that would have rebutted the government's case? Would he think it was not false to lie in a corporate application merely because the applicant was not a natural person? Would he claim to be more innocent in making such a false statement because he had hired a lawyer expressly to advise him that the corporation as an applicant would be turned down by the Liquor Board? The only fact which is at all clear in this struggle to fill the record with corporation minutes is that the defense tried to inject into the case an issue which was obviously irrelevant— whether DePratu wanted the license to run a saloon under the corporation entity, or to run one as an individual. Either way he would be guilty if he falsified the application as charged, and this was never denied, rebutted or questioned.

Again, what difference would it make or did it make if after getting the license, he assigned it to the cor-

poration? The crime of making the false representation was already complete before the license was issued, and before it could be assigned. It is somewhat amusing to consider the argument that DePratu did not have to make the application himself because he had in his corporation two incorporators who were citizens, and so he could have had one of them make it. Of course he could, but he chose not to. He was out to get a liquor license one way or another, and he employed the subterfuge of making it in his own name personally, so as to comply (?) with the state law. The license was actually for the 'Stockman's Club' and its actual use was the same from start to finish. Wherein does this evasion of the state law furnish a defense that defendant did not know he was making a false claim of citizenship? It only tends to show that making such a false claim was a trifling matter to him. The trial court took the view that it was not a trifling matter:

> "These papers are not idle forms, and if an individual makes an application to the state in which these questions are asked him and if there is a fact falsified, because they are printed and he did not read it, it will not excuse him." (R. 152.)

This quotation also shows that the trial court expected, because of the counsel's opening statement, that DePratu would take the stand and testify that he did not read the applications. If he had done so, some kind of an argument might have been made that the

excluded matters were corroborating circumstances; but there was nothing to corroborate.

Again, how can appellant complain that it was not shown that the Liquor Board "deemed" the application to be corporate or personal? We don't know what the witness would have said, but if the Board had "deemed" it to be corporate and acted favorable upon it, it would have violated the Montana Liquor Control Act. (Appendix.) And the court would then have entertained the spectacle of the attorney for the Liquor Board testifying that the Board had ignored his advise and accepted an illegal subterfuge. Of course, the whole thing was inadmissible because it was an attempted lay interpretation of a document which was before the court for the court's own interpretation.

Now we come to "motive". Appellant says:

> "Therefore, the Court by refusing to give offered instruction No. 16, in which it is stated that the absence of motive might be considered by the jury, also prejudiced the defendant." (Brief, 54.)

In support of this contention counsel quotes from 23 C.J.S. sec. 1198 **only the title** of the paragraph. The paragraph in its text is as follows:

> "Where there is evidence as to motive, it is proper to instruct that the absence of a probable motive is a circumstance in favor of accused, or at least a circumstance to be considered in weighing the evidence of guilt, particularly where, by an instruction for the prose-

> cution, the attention of the jury has been directed to accused's motive; but, where there is evidence sufficient to indicate that there was a motive, the court may refuse to instruct that lack of motive is a circumstance favoring accused; and it is not improper to instruct that, where a motive is shown, it is more likely that accused committed the crime than a man who had no motive. The court need not charge that there is no evidence of motive. If the offense is made out clearly, it is not necessary to prove motive, and the court properly may so charge, or may refuse a request to charge to the contrary. Where intent has been shown by direct or circumstantial evidence, it is not material that the jury be instructed as to motive."

The evidence both of motive and intent was actually supplied by the defense in Exhibit 15 (R. 167.):

> "The said L. P. DePratu, thereupon offered to obtain slot machine licenses in accordance with the laws of the State of Montana and beer and liquor licenses for said establishment in accordance with the laws of the State of Montana and to pay for the same personally, providing he would be secured at some future date for said expenditure."

Apparently the two Lundby sisters, who were co-incorporators, were not in a position to advance the license fees and other expense incurred in forming this "non-profit club" which was to reimburse appellant for his outlay. He kept everything under his own personal control, and it is absurd to contend that he did so through mere indifference or inattention. The Lund-

bys were what we sometimes call dummy directors. In fact the argument of counsel seems to be that he could have used one of his dummies to apply for the licenses. Doubtless he would have done so if he had forseen the consequences which have taken place in this action. It is in the record that he had one Sherman Smith, a competent lawyer, advising him in the formation of this concern. Sherman Smith (not to be confused with Paul Smith, attorney for the Liquor Board) was not called as a witness, and it is obvious that if he had been called he would hardly have testified that he advised DePratu to make a false oath and claim of citizenship, but rather have insisted that that claim was solely the act and responsibility of DePratu himself.

In this connection appellant complains of the interruption of his argument to the jury, as quoted on p. 62 (appendix) of the appellant's brief:

> "Mr. Acher: . . . Was considered by Mr. Smith as an application on behalf of the Stockman's Club. (interrupted)
>
> "The Court: Confine yourself to the evidence. No such evidence was permitted in the case. Objections were constantly sustained to that line of testimony." etc.

That the trial court here spoke by the record appears from R. 145:

> "Q. (By Mr. Acher to witness Paul Smith, attorney for the Liquor Board) In your consideration of this application was it deemed an application of DePratu individually or an

application of the Stockman's Club?
(Objection)
"The Court: Yes, sustained. It is an invasion of the province of the jury. It is an exhibit in evidence, and it is for the jury to say whether it is an application made by DePratu or the Stockman's Club. It is a question for them to decide, not for a witness on the witness stand."

We cannot better summarize this entire head of discussion than by pointing to the extraordinary contradiction involved in the attempted defense. In one breath the defense claimed that DePratu, through inattention or carelessness, thought he was making a corporate application, and in the next breath proved that it was forcibly brought to his attention that the corporation could not be eligible. It is more than confusing. It is self-destructive of the attempted defense.

VARIOUS CRITICISM OF INSTRUCTIONS

Under this head we deal briefly with the only remaining specifications of error not already covered.

1. There was no requirement of or duty upon the trial court to instruct the jury on the subject of derivative citizenship for the reason that there was no evidence admitted or offered which tended in any way to show that such citizenship was acquired by appellant. The court's charge need not deal with a hypothesis purely imaginary.

2. As to the court's definitions of "feloniously", "knowingly and wilfully" and "falsely" it seems to

the writer that not only were these words correctly defined by the court, but also that the charge as a whole made it impossible for the jury to be misled, to the appellant's prejudice or otherwise, as to the elements of the offense charged. The point was properly summed up by the court's charge as follows: (R. 237.)

> "The intent that is material here is whether or not, as I have told you, he intended to deceive the State Liquor Control Board into believing he was a citizen and thus issue a liquor license to him."

None of the authorities quoted give ground for the conclusion that any of the criticized instructions were erroneous.

The judgment should be affirmed.

Respectfully submitted:

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HARLOW PEASE,
Assistant U. S. Attorney;

EMMETT C. ANGLAND,
Assistant U. S. Attorney.

APPENDIX

Title 8 U.S.C. sec. 746.

(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—

(18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized to citizenship, or without otherwise being a citizen of the United States.

Title 18 U.S.C sec. 141. (repealed) Whoever shall knowingly use any certificate of naturalization heretofore or which hereafter may be granted by any court, which has been or may be procured through fraud or by false evidence, or which has been or may hereafter be issued by the clerk or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; or **whoever, for any fradulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined** not more than $1,000, or imprisoned not more than two years, or both. (Italics ours).

Rules of Criminal Procedure.

Rule 7 (c) Nature and Contents. The indictment or the information shall be a plain, concise and

definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The Court on motion of the defendant may strike surplusage from the indictment or information.

(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Chapter 84, LI. Montana 1937:

Sec. 3. The Montana Liquor Control Board is hereby empowered, authorized and directed to issue licenses to qualified applicants as herein provided * *

Sec. 5. Prior to the issuance of a license as herein provided, the applicant shall file with the Montana liquor control board an application in writing, signed by the applicant, and containing such information and statements relative to the applicant and the premises where the liquor is to be sold, as may be required by the Montana liquor control board. The application shall be verified by the affidavit of the person making the same before a person authorized to administer oaths. If any false statement is made in any part of said application, the applicant, or applicants, shall be deemed guilty of misdemeanor and upon conviction thereof the license, if issued, shall be revoked and the applicant, or applicants, subjected to the penalties provided by law.

Sec. 10. **No license shall be issued by the board to:** * * *

6. **A person who is not a citizen of the United States** and who has not been a citizen of the State of Montana for at least five (5) years and who has not been a citizen of the county in which the license is to be issued for at least one (1) year.